

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2586

STATE OF WISCONSIN

Cir. Ct. Nos. 2011TR3699
2011TR3700

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICK A. LUTTER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County:
JENNIFER DOROW, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Nick Lutter appeals a judgment of conviction for operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

intoxicant, first offense (OWI),² and challenges an order denying his motion to suppress.³ Lutter argues on appeal that a state trooper lacked reasonable suspicion to stop his vehicle because the circuit court's finding that a video recording of the incident began after Lutter crossed over the fog line two times is clearly erroneous. According to Lutter, the circuit court's finding is clearly erroneous because the trooper testified that Lutter twice crossed over the fog line before Lutter passed Brookfield Road, and the video recording begins before Lutter passed Brookfield Road and does not show that Lutter crossed over the fog line. We conclude that the circuit court's finding was not clearly erroneous because Lutter's claim that the video recording began before he passed Brookfield Road, and thus before he allegedly crossed over the fog line, is not supported by the video recording itself or any other evidence in the record. Because Lutter makes no other arguments as to why the trooper lacked reasonable suspicion to stop his vehicle, we affirm.

BACKGROUND

¶2 The following facts are taken from State Trooper Daniel O'Connor's testimony at the suppression hearing. On October 17, 2010, at around 2:00 a.m., Trooper O'Connor was traveling westbound on I-94 in the City of Brookfield. While traveling in the far left lane, Trooper O'Connor noticed a vehicle traveling in the far right lane that appeared to him to be traveling in excess of the sixty-five mile per hour speed limit. As Trooper O'Connor drew closer to the vehicle, he

² In his notice of appeal, Lutter states that he appeals the convictions entered against him, finding him guilty of OWI and operating with a prohibited alcohol concentration (PAC). However, the conviction for operating with a PAC was dismissed on the State's motion and that judgment of dismissal cannot be appealed.

³ Judge Mark Gundrum heard and denied the suppression motion.

estimated that the vehicle reduced its speed to approximately fifty-five miles per hour. However, Trooper O'Connor did not use his speed radar device to determine the exact speed of the vehicle.

¶3 As he was attempting to determine the speed of the vehicle, Trooper O'Connor witnessed the vehicle cross over the fog line, just before passing Brookfield Road. Trooper O'Connor witnessed the vehicle again cross over the fog line as it passed Brookfield Road and then drive onto the fog line immediately after passing Brookfield Road.

¶4 In light of these observations, Trooper O'Connor initiated an investigatory stop and identified the driver of the vehicle as Lutter. Based on Lutter's performance on field sobriety tests and a preliminary breath test, Trooper O'Connor arrested Lutter for OWI.

¶5 At the suppression hearing, defense counsel showed Trooper O'Connor the video recording of the incident that Trooper O'Connor took using the video camera from his squad car. The video recording begins approximately thirty seconds before Trooper O'Connor activated his emergency lights.

¶6 After watching the video, Trooper O'Connor testified that he activated the video camera "just immediately prior" to passing Brookfield Road. Trooper O'Connor testified that "it takes about three to five seconds" for the video to actually begin recording and that the video recording began while "we were passing Brookfield Road," which was after Lutter crossed over the fog line two times. Trooper O'Connor testified that the camera was recording when Lutter drove onto the fog line immediately after passing Brookfield Road, but that it was "difficult to see" Lutter drive onto the fog line in the video because of the poor quality of the video.

¶7 The circuit court determined that Trooper O'Connor had reasonable suspicion to conduct a stop based on the totality of the circumstances. The circuit court acknowledged that the video recording merely showed Lutter "traveling along the edge of the fog line" and did not show him driving onto or crossing over the fog line at any point. However, the court credited Trooper O'Connor's testimony that Lutter crossed over the fog line two times before the video recording began and concluded that Trooper O'Connor had reasonable suspicion to conduct a stop based in large part on that testimony. Accordingly, the circuit court denied the motion to suppress. The case was tried to a jury, and Lutter was convicted of OWI. Lutter appeals.

DISCUSSION

¶8 Whether reasonable suspicion exists for a stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. *Id.* First, we review the circuit court's findings of historical fact. *Id.* When the evidence in the record consists of testimony and a video recording, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See State v. Walli*, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898. Under the clearly erroneous standard, "we are bound not to upset the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence." *State v. Popke*, 2009 WI 37, ¶20, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting another source). Second, we determine whether the facts amount to reasonable suspicion as a question of law subject to de novo review. *Williams*, 241 Wis. 2d 631, ¶18.

¶9 As we have indicated, Lutter argues on appeal that Trooper O'Connor lacked reasonable suspicion to conduct a stop because the circuit court's finding that Lutter crossed over the fog line two times before the video recording began is clearly erroneous. According to Lutter, the circuit court's finding is clearly erroneous because the video recording began before Lutter passed Brookfield Road, which was "where the first violation supposedly happened," and the video does not show that Lutter crossed over the fog line at any point. We are not persuaded.

¶10 Lutter's argument that the court's finding is clearly erroneous hinges on his claim that the video recording began *before* he passed Brookfield Road. However, neither the video recording nor the other evidence in the record supports Lutter's claim. We have carefully reviewed the video recording, and Brookfield Road is not identified in the recording. Lutter points to no other evidence in the record, such as a portion of the transcript of the suppression hearing, that identifies where Brookfield Road is located in the recording in order to establish that the video recording began *before* he passed Brookfield Road. The circuit court credited Officer O'Connor's testimony that the recording began *while* Lutter was passing Brookfield Road, and not before Lutter passed Brookfield Road. Based on that testimony, the circuit court could reasonably find that the video recording began after Lutter crossed over the fog line just immediately prior to and at Brookfield Road.

¶11 In sum, we uphold the circuit court's finding that Lutter crossed over the fog line two times before the video recording began because nothing in the record, including the video recording, establishes that the court's finding is against the great weight and clear preponderance of the evidence. *Popke*, 317

Wis. 2d 118, ¶20. Because Lutter develops no other argument as to why Trooper O'Connor lacked reasonable suspicion to conduct a stop, we affirm.⁴

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁴ We note that Lutter does not develop an argument specifically challenging the circuit court's finding that Lutter reduced his speed to approximately fifty-five miles per hour when Trooper O'Connor approached him, and therefore, we do not address whether that finding was clearly erroneous or whether it provided support for the circuit court's conclusion that Trooper O'Connor had reasonable suspicion to conduct a stop.

Lutter also does not fully develop an argument that Trooper O'Connor lacked reasonable suspicion to conduct a stop based on the totality of circumstances, including Lutter's reduction in speed and lane deviations, combined with Trooper O'Connor's experience in investigating OWI cases and the time of night that the incident occurred. We therefore do not further address the topic. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments that are not fully developed will not be addressed on appeal).

